United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2281

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

PENT-R-BOOKS, INC.,
Defendant-Appellant.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

DEFENDANT-APPELLANT'S REPLY BRIEF.

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Appellee's brief is not only replete with misstatements both of Pent-R's position and of the law, but upon analysis reveals that it seeks here to use an injunction as a punitive weapon rather than for its deterrent effect. To elucidate:

1. The use of the injunctive weapon for punitive purposes rather than deterrent purposes is clear from analysis of the Government's brief. While professing that it is not seeking a general injunction, it does note that, in addition to the twenty cases here, it is seeking injunctions in 341 other Pent-R cases, with more to follow

(Govt. brief, p. 4).[1] Moreover, it skirts the issue as to whether computer error would be a defense in a contempt proceeding, noting in different places in and around its brief that the use of defendant's computerized system might be in mitigation of a contempt finding, or conceivably avoid one altogether, and that it is unlikely that Pent-R would ever be held in contempt. If so, we may ask, when Pent-R has been completely free of even alleged violations of the Pandering Law since its improved computerization system went into effect years ago, why does the Government seek the injunction here, in what would seem a monumental waste of resources of the prosecutor, with a tremendous burden being imposed upon the Court? What, then, is the motivation for seeking injunctions which are totally unnecessary, and which can have no effect whatsoever?

What is noteworthy is that, even at this stage of the proceedings, the Government has yet to suggest any additional precaution whatsoever that Pent-R could take to insure compliance with postal prohibitory orders, over and above those precautions it has already taken. These assure that no second mailings will be made to those

[1]The Government, by this disclosure, attempts to paint Pent-R as a willful violator of the Pandering Law. Quite apart from the fact that some 10,000,000 advertising pieces had been mailed (see our opening brief, p. 8, fn. 4), we note that all the other pending cases involve second mailings made *before* the 1970 and 1971 improvements in defendant's computerization. The Government writes (p. 9) that "the district court determined that the issuance of compliance orders *was* necessary to ensure future compliance." Quite apart from the fact that no such finding was made, there was not a scintilla of evidence to support such a conclusion, and there has been complete compliance for five years *without* orders. The record shows constant attempts to improve computerization as new problem areas were discovered. Defendant's computerization is working, and will not be changed—unless we can think of improvements to be made.

who do not want them, even at the burden of depriving millions of people of the right to receive mail from Pent-R that they would desire.

The reason for the Government's procedure becomes clear upon analysis. In *Rowan v. United States Post Office Department,* 397 U. S. 728 (1970), the Government assured the Supreme Court of the United States that no mailer could ever be found in contempt unless the second mailing was willful.[2] Clearly, any second mailing by Pent-R would never be willful, so long as it continues to use its computerized system. One of the numerous settlement offers made by us to the Government was that we would consent to the entry of an order against any *willful* second mailing, while continuing to be bound by Court order to use the precautions presently in use against second mailings. But the Government rejected this. Now, the Government no longer takes the position that it took in *Rowan,* that only a willful second mailing would be punishable as a contempt, and indicates that it will attempt to secure contempt citations even for non-willful mailings. Thus, one of the underpinnings of the *Rowan* decision—the Government's assurance that only a willful violation of an injunction would be considered contemptuous—is removed. The Government, by its proceeding for injunctions which can have no possible deterrent effect whatsoever—which the Government does not deny—is thus laying the foundation for attempting a contempt proceeding in the absence of willfulness.

2. The Government constantly insists that Pent-R claims a right to send unwanted material into homes with

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[2]The Government brief in *Rowan, supra:*

"Only if [the mailer] violates the order of the court does he risk contempt. *Even then, willfulness would be an element of the contempt* • • •" (p. 50). (Italics supplied.)

minor children.[3] But Pent-R has never taken any such position. On the contrary, Pent-R, at great expense to itself, long prior to the existence of the Pandering Law, had devised a system under which the recipient of mail was told on the mailing envelope, or on an inner sealed mailing envelope, of the nature of the material enclosed, and invited to return it at Pent-R's expense if it was unwanted, with Pent-R deleting the name from its mailing list.

Moreover, the position we have taken here is not that the Pandering Law is on its face unconstitutional. Our claim is, *inter alia*, that since the same objective could have been achieved by a narrowly drawn statute prohibiting mailings only to names in the varying formulations supplied by the addressees—a point not argued in *Rowan*—the statute must fall.[4] The rights of persons

[3]Interestingly enough, there is no evidence in the record as to whether the addresses to which second mailings were sent were homes or offices, nor do any of the cases at bar involve a mailing to minors.

[4]The Government argues that "while the supplying of alternative name formulations might be a laudable suggestion which would enable defendant to incur less expense in avoiding mailings to offended addressees, it is not constitutionally required" (p. 15). Actually, supplying of alternative name formulations would cause defendant to incur *more expense*, since each separate name formulation would have to be fed into the computer, necessitating extra time on the part of the person feeding the material in, and taking more computer time when the kill tape—now made longer—is run against the mailing list. However, this would protect the defendant's right to mail to people who want to receive mail, without having to cease mailings to many people who do want to receive its mail. The alternative name formulation, used by Congress in the Goldwater Amendment, would thus create more expense for the defendant, but would protect its constitutional rights and the rights of those who would want to receive mailings from defendant, presently prohibited.

on rented mailing lists have been adequately protected by the Goldwater Amendment to the Postal Reorganization Act, and, indeed, no person on any mailing list should receive even a first offensive mailing, since any person can have his name placed on the list of persons to whom sexually oriented ads may not be sent. Thus, the Goldwater Amendment, not in existence when the *Rowan* case was brought, adequately and thoroughly protects the rights of the public.

While the Government argues as if the Supreme Court's decision in *Rowan* disposed of our contentions, we note, firstly, that the mailers in *Rowan* never raised a First Amendment question, conceivably for fear that their advertisements might have been then ruled obscene, the fact remains that the Supreme Court in *Rowan* never balanced the rights of the addressees against the First Amendment rights of the mailer, and hence *Rowan* is not dispositive of this case.[5]

(Incidentally, we pause to correct the Government's notation that *Rowan* was *decided* a few days after the Pandering Law took effect [p. 14]. That test case was *brought* a few days after the Pandering Law took effect,

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[5]The Government recites at page 15:

> "* * * In the cases at bar, the constitutional right of privacy of the individuals involved is being balanced against the expense which defendant must incur to avoid invading that right."

The Government, however, completely fails to tell us what further expenses the defendant must incur, or how they can be incurred, in order to prevent a second mailing. There is no such further expense that can be incurred. As the undersigned has said for many years: Tell us what to do, oh Government, and we will do it—but the Government has never come up with the slightest suggestion.

and so the record in that case did not reveal the operation and effect of the statute, nor was it briefed nor argued in the Supreme Court.)

3. For all the Government's attempts to distinguish *Hecht Co. v. Bowles,* 321 U. S. 321 (1944), it nonetheless cannot get around the Supreme Court doctrine that a grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances, nor the language of the Supreme Court that "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles,* 321 U. S. at 329.

4. The nonexistence of an Article III case or controversy is clear from the Supreme Court's recent holding in *Rizzo v. Goode,* U. S. (1976), 44 U. S. Law Week 4095 (1/21/76). Referring to the case of *O'Shea v. Littleton,* 414 U. S. 488 (1974), the Court noted in *Rizzo* that:

> "And even though respondent's counsel at oral argument [in *Rizzo*] had stated that some of the named respondents had in fact 'suffered from the alleged unconstitutional practices,' the [Supreme] Court concluded that '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing present adverse effects.' *Id.,* at 495-496. The Court further recognized that while 'past wrongs are evidence bearing upon whether there is a real and immediate threat of repeated injury,' the attempt to anticipate under what circumstances [this would happen] 'takes us into the area of speculation and conjecture.'" 44 U. S. Law Week at 4098.

In the cases at bar, any conduct of defendant in the past in violating a postal prohibitory order is totally unaccompanied by any present adverse effect whatsoever, and therefore there is no case or controversy regarding injunctive relief. There is neither real nor immediate threat of repeated injury, and no injury to any complaining addressee has been repeated in the last five years. The Government does not deny our contention that only 0.015% of a complaining person would stand a statistical chance of ever receiving another mailing from defendant. Thus, not only is there no real or immediate threat, but there is simply no threat whatsoever, and hence no case or controversy. Far from threatening to mail again, defendant has spared no effort or expense whatsoever to avoid a second mailing, even to this fifteen-thousandths of 1% of a person.

5. The Government constantly takes us to task because at no point did we introduce evidence to show the date of a second mailing. However, there was no obligation to do so, in the absence of the Government having offered any valid, admissible proof as to the date of the second mailing, by presumption or otherwise. For the burden to show that there was no genuine issue of material fact rests on the party moving for summary judgment, whoever would have the burden of proof at trial. Thus, in the leading case in this Circuit of *Dyer v. MacDougall,* 201 F. 2d 265 (2nd Cir. 1952), in an opinion written by Judge Learned Hand, where the Court affirmed summary judgment for defendants in a slander action on the ground that the defendants had never uttered the alleged slanderous statements, the following was held:

> "The defendants had the burden of proving that there was no such issue; on the other hand, at a trial the plaintiff would have the burden of proving the utterance, and therefore, if the defendants on

> the motion succeeded in proving that the plaintiff would not have enough evidence to go to the jury on the issue, the judgment was right."

Here, too, plaintiff did not have enough evidence to make a prima facie case, both because the "certified" records were inadmissible, invalid, and because even if admissible, none of them made out a prima facie case. Hence, it was totally unnecessary for the defense in these cases to submit evidence as to the dates of actual mailing.[6]

6. The Government, in response to our attacks upon the admissibility of the so-called certified records, argues that our "main complaint seems to be that 'all certifications were made by an official in Washington, D. C., though the persons having custody of the records are

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[6]The Government contends that the defense does not keep records of mailings (p. 3), while elsewhere it contends that all information was kept by computer (p. 29). There is no evidence in the record as to anything being kept in the computer other than the names and addresses to whom second mailings should not be sent, nor is there any evidence in this record as to whether or not records were kept of dates of mailing, or of dates of receipt of prohibitory orders. The desire of the defense to prevail upon the Government's own case, without checking whatever records it might have, is quite obvious from the fact that the defendant has made millions of mailings, and that, as we noted previously it has received some 250,000 prohibitory orders. Checking such records, in the absence of the Government making a prima facie case, would obviously be extremely burdensome, and therefore we hold the Government to the normal legal rule, that it itself must prove its own case. The Government recites that we did not deny that the second mailings were made after the effective dates; our position, however, has clearly been that there has been no proof whatsoever of the existence of any violation, and where answers were filed, defendant did deny that the second mailing was in violation (e. g., par. TENTH, 220a, and par. 44, 238a). Plaintiff's motion papers [e. g., 136a-137a] did not allege violation).

those in charge of 64 Postal Service Centers across the country'" (p. 19). The Government thus fudges the issue. Our objection, as we clearly stated at page 20 of our brief, is that Rule 44(a) of the Federal Rules of Civil Procedure was not complied with, in that, to now use the words of the rule, the copy was not "attested by the officer having legal custody of the record, or by his deputy, [nor] accompanied by a certificate that such officer has the custody." Moreover, Rule 44(a) was not complied with, since the certificate was not made by "any public officer having a seal of office"—none of the officers signing having a seal of office, only the Post Office seal—"and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office," and these were missing, too. We further noted other inadequacies of certification (pp. 19-21), which the Government ignores.

The Government next relies (p. 19) on Rule 902(1) of the Federal Rules of Evidence which provides that "A *document* bearing a seal purporting to be that of the United States * * * or of a political subdivision, officer or agency thereof, and a signature purporting to be an attestation or execution" does away with the requirement of evidence of authenticity. (Emphasis supplied.) However, Rule 902 (1) is totally inapplicable: not only are the records certified not public documents bearing a seal —the only thing bearing a seal is the certification itself, not an original document—but this rule does not deal with authentication or admissibility of *copies* of records. Moreover, the Federal Rules of Evidence, pursuant to the Supreme Court's order of November 20, 1972, are applicable to actions and proceedings brought *after* July 1, 1973. All the actions in the cases at bar were brought in 1969 or 1972, and hence the Federal Rules of Evidence are inapplicable. And certainly, every certification in

the cases at bar was prepared long prior to the Federal Rules of Evidence taking effect. No suggestion was made at any time below that the Federal Rules of Evidence applied, nor has any applicable section of such Federal Rules of Evidence been cited by the Government.

7. The Government argues that evidence as to the date of receipt of the second mailing should be admissible under the business records exception of 28 U. S. C. §1732.

However, §1732 refers to business records, but it is §1733(b) which refers to records of any department or agency of the United States—and copies of these may only be admitted under 28 U. S. C. §1733(b) when they are "Properly authenticated"—and these were not. Such a defense does not appear to have been raised in *United States v. Lange,* 466 F. 2d 1021 (9th Cir. 1972). Nor did *Lange* admit evidence as to the *date* of receipt of the second mailing, but only the fact that the second mailing had been received. And we have never denied the receipt of the second mailing. But there is no inherent reliability, as to evidence as to the date of receipt, and hence such evidence should not be admissible.[7]

The Government further attempts to sustain admissibility on the theory that the complaining addressees acted as *ad hoc* officials, citing *LaPorte v. United States,* 300 F. 2d 878 (9th Cir. 1962). However, unlike *LaPorte,* all that was submitted here by the Government were *copies* —and this does not get around the fact that the copies were not properly authenticated and certified.

[7]While citing *Lange,* for admissibility, the Government is most careful, indeed, to ignore *Lange's* clear holding under which summary judgment should have been denied in several cases here. See brief for defendant-appellant, pages 32-34.

Moreover, *LaPorte* rested on totally different grounds. As the Fifth Circuit noted in *United States v. Halperin*, 441 F. 2d 612, 619 (5th Cir. 1971):

> "* * * *LaPorte* dealt with the admissibility of a Selective Service printed form from a registrant's folder titled 'Order to Report for Civilian Work and Statement of Employer,' upon which had been written the words 'Did not report.' The court ruled that the form was admissible to show that the registrant had not in fact reported for civilian work. In that case, however, the Personnel Officer of the Department testified that it was the practice, in the ordinary course of business, for one of the six or seven employees in the office to write 'did not report' on the form when a registrant failed to report as required by the order. Thus in that case the regularity of the entry in the ordinary course of events gave it the necessary indicia of accuracy to permit its admission as an ordinary business record and as such an exception to the hearsay rule."

But in the cases at bar, there was certainly no regularity of entry by a complaining addressee as to dates of receipt of mailed matter, and there was thus no indicia of accuracy in such notations whatsoever.

8. The Government indicates that we made no attempt to depose any addressee, and that in the administrative hearing the issues could have been explored as to who made the notations of dates, and what those dates represented. This proceeds on totally false assumptions. Attempts were made to depose the addressees in the administrative hearings, the request for such depositions being contained in every request for hearing filed by the undersigned (e. g., 180a). No complaining addressee was ever

produced at a hearing, nor was the requested advice—as to whether the complaining addressee would appear—ever answered, nor was the requested deposition ever granted. We have already alluded to the fact that our efforts to obtain a deposition in another case, also handled by the undersigned, met with ruling against us by this Court (brief for defendant-appellant, p. 22, fn. 6).

Under the circumstances, where no complaining addressee was ever produced for deposition or at a hearing, how the issues could have been raised or explored is beyond comprehension.

The Government goes on to note (p. 25) that our forms of objection do not indicate that we intended to raise the issue of the meaning or method of inscription of the date notations in the administrative records—but the only time this was not raised was when we had not been presented with the administrative records, so that we did not know of the availability of that objection. Nor do we understand the Government's contention that our request that hearings be transferred to New York indicates a lack of interest in the procedures used in local Post Offices. Firstly, we still expected that the Government would be required to prove its case, which the Government here denies. Secondly, the cost of having hundreds of hearings at different places around the United States would obviously have been prohibitive.

9. The Government completely fails to deny our contention that, if the presumption is a 30-day presumption rather than a 60-day presumption, a delay in the receipt of the prohibitory order might mean that the mailer had no time whatsoever to comply with the prohibitory order, or that, with the intervention of holidays and weekends, a mailer might be deprived of the 30-day grace period.

The Government claims instead (pp. 27-8) that Congress would have no rational basis for making a distinction between mailers who date their material and those who do not. Not at all. For one thing, mailings could be made not only by first class mail, but by third class mail, or by bulk mail, with bulk mail being the last mail to leave the Post Office after all other mail has gone out, sometimes being taken from the Post Office weeks after it is deposited in the mails. Moreover, in setting up the presumption, Congress obviously must have been aware of the fact that if the presumption period ran only 30 days from the date of the prohibitory order, a delay in the sending of the prohibitory order in the mails, or otherwise, would have given the mailer who did not date his mail substantially less than the 30-day period. Thus, the rational basis was indeed there. And if it was not, the Government has proven too much: if the presumption be irrational, it must fall altogether, since obviously it is applicable only to the mailer who does not date his mail, and is then thoroughly irrational.

The Government attempts to sustain the doctrine of "semantic slip" below by its citation of *Betts v. Weinberger*, 391 F. Supp. 1122 (D. Vt. 1975), aff'd 96 S. Ct. 388 (1975), claiming that a Court can conclude that certain words, or indeed whole sections, only appear in a statute through Congressional oversight (p. 28). What the Court really held, however, was as follows, at 1129:

> "We agree with defendant Weinberger and reject plaintiffs' claims as unreasonable, basing our holding on what we conceive to be the reasonable interpretation of the statute and the one which gives the language of the statute the effect most likely to conform to the intent of Congress as expressed in the legislative history."

No legislative history has been cited here to indicate that Congress made a "semantic slip," nor does the Government deny that the statute, as construed below, clearly may be unreasonable in many circumstances.

Judicial surgery where the Congressional patient acted clearly and rationally should not be tolerated.

10. The Government argues, in its Point V, that defendant was effectively apprised of the nature and cause of the accusations against it merely by the administrative complaints, and that we cannot be heard to say that the information was insufficient as to the existence or date of second mailings. But since the complaints never did show the date on which the second alleged mailing was sent or received, no information was given of this whatsoever, nor was information as to the date on which an addressee received a second mailing available through defendant's computerized system.

The Government attempts to argue that the exhibits were annexed to the complaint, complaining that the allegations that they were not appeared in the undersigned's affidavit and that of the secretary of Pent-R, neither of which alleged that the complaint was opened by him when it arrived at Pent-R. Yet, in each case in which defendant recites that less than the exhibits supposed to be annexed were annexed, this is in the affidavit of the secretary, Mr. Schwartz, who also recited that he was fully and personally familiar with all the facts set forth in his affidavit (e. g., 185a, 210a). Thus, Mr. Schwartz recited this as of his own personal knowledge.

The Government perhaps argues too strongly, when, at page 32, it recites that any evidence not presented at

the administrative hearing could be presented before the District Court. However, the District Court did foreclose us from raising varying points unless they had been made in the request for a hearing. Thus, the rule suggested by the Government itself shows that defendant was deprived of its rights.

11. The Government next (Point VI) argues that we cannot attack the production of a signed return receipt from official custody as per se unworthy evidence. We suggest that we can, when the Government had some 250,000 return receipts from Pent-R in its possession, and the return receipts in these cases were not in any way, shape or form tied in with the respective prohibitory orders.

Respectfully submitted,

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